

STATEMENT OF THE CASE

James Kanable appeals his convictions for Child Molesting, two as Class A felonies and one as a Class C felony, after a jury trial. He raises four issues for our review, which we restate as follows:

1. Whether the charging information lacked specificity such that he was denied the opportunity to present a meaningful defense.
2. Whether the trial court improperly excluded evidence.
3. Whether the jury unanimously agreed that he committed the crimes as charged.
4. Whether his convictions violate his right to be free from double jeopardy.

We affirm.

FACTS AND PROCEDURAL HISTORY

Kanable married K.K.'s grandmother, Sherry Kanable, on July 29, 1994, when K.K. was two years old. Sherry and Kanable lived in Kokomo, and from the time K.K. was about three years old, she spent the night at Sherry's home three to four times a month. K.K. called Kanable "Jimmy." Transcript at 67. Kanable tickled children, including K.K., and he called this tickling the "Kanable torture." *Id.* at 49. When K.K. was eleven years old and started wearing a bra, Kanable started to tickle her under her clothes and bra. K.K.'s cousin saw Kanable tickle K.K. between her legs.

During November 2005 and April 2006, Kanable came into the family room, where K.K. slept on the couch, and he licked and sucked her vaginal area with his mouth. He asked K.K. if it felt good. Kanable also put his penis into K.K.'s vagina on two occasions during that same time frame. The first time was between Thanksgiving and

Christmas, and the second time Kanable had intercourse with K.K. was approximately a month before K.K. told anyone. One weekday in April 2006, Kanable fondled K.K. over her clothes.

On April 22, Amy King, K.K.'s mother, found some emails that she thought were inappropriate for K.K., who was thirteen at the time. Amy took K.K. for a ride in the van so that they could talk. Amy asked K.K. if she was sexually active and needed birth control. K.K. denied that she was sexually active and cried. Amy told K.K. that they were going to see a gynecologist, and K.K. said that she had been raped. Amy asked her who did it, and K.K. said, "Jimmy." Transcript at 67.

Amy and K.K. returned to Amy's house where they met Sherry. The three then went to Sherry's house to confront Kanable. When Amy accused Kanable of raping K.K., he said, "[I]t wasn't rape." Id. at 39, 155. Amy called the police.

On April 25, Detective Galloway took a statement from K.K. Although K.K. had told her mother only about the intercourse, she told Detective Galloway about the other incidents. On May 12, Dr. Radcliff Jones conducted a physical exam of K.K. and found that her hymen was almost completely intact. He found a suspicious area that may have been caused by a break in the hymen tissue and subsequent healing. The break could have been caused by "[f]orceful penetration of the hymen." Id. at 132.

On June 14, the State charged Kanable with three counts of child molesting.¹ Count I alleged that Kanable either performed or submitted to sexual intercourse or deviate sexual conduct with K.K. between November 2005 and January 2006. Count II

¹ The State also charged Kanable with Sexual Misconduct with a Minor, as a Class C felony, for allegedly fondling B.B. The jury acquitted Kanable of that charge.

alleged that Kanable either performed or submitted to sexual intercourse or deviate sexual conduct with K.K. between January 2006 and April 2006. Count III alleged that Kanable performed or submitted to fondling or touching of K.K. in April 2006.

The State moved for the admission of K.K.'s videotaped statement to Detective Galloway, and the trial court held a hearing on that motion on December 14. Kanable's counsel objected to the videotape's admission because K.K. was not a protected person and the admission would violate Kanable's right to confront K.K. The court stated, "One of my other concerns is simply the quality of that tape. . . . I will definitely make some comment on [the tape's quality] because that's just very difficult." Appellant's App. at 77. The court denied the State's motion in a written order.²

The court held Kanable's jury trial starting December 19. During K.K.'s testimony, Kanable's counsel asked her when was the last time that Kanable touched her, and K.K. said it happened on a school day after Easter in the evening, but she did not remember the exact date. Kanable called Detective Galloway as a witness and asked her when K.K. said that the last molest happened during K.K.'s statement. Detective Galloway said that she tried to pin the date down to April 17, but that K.K. was never really sure which date the fondling occurred.

Kanable's counsel then asked for a hearing outside the jury's presence, which was granted, and he asked the court for permission to play the final two minutes of K.K.'s videotaped interview. He argued that the statement proved that K.K. had specifically stated that the last touching occurred on April 17, and the statement should be admitted

² Appellant included the State's Notice of Intent to Use Out of Court Statement or Videotape in his Appendix, but the court's written order denying the admission of K.K.'s statement was not included.

for impeachment purposes. The court and the parties discussed both the quality of the tape and whether the entire tape would have to be played if a portion of that specific portion of the tape was played. The court denied Kanable's request to play the final two minutes of K.K.'s statement, and Kanable's counsel made an offer to prove that "the last two or three minutes of the tape [] deals specifically with the child establishing April 17 as the last incident of touching or fondling." Transcript at 180.

After the jury returned to the courtroom, Kanable's counsel again asked Detective Galloway if she had established April 17 as the date of the final time that Kanable touched K.K., and Detective Galloway replied that it was possible. Kanable presented evidence that he was at work on April 17 at 3:32 p.m. and then left work at 11:30 p.m.

The jury convicted Kanable of all three counts. On February 9, 2007, the court sentenced Kanable to an aggregate term of thirty-four years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Specificity in Charging Information

Kanable contends that his charging information was defective. Generally, a challenge to the sufficiency of an information must be made by a motion to dismiss, and the failure to assert error in an information waives that error. Dickenson v. State, 835 N.E.2d 542, 549 (Ind. Ct. App. 2005), trans. denied. Kanable never alleged that his charging information was defective at trial, and, thus, he has waived review of this claimed error. See Stroud v. State, 809 N.E.2d 274, 287 (Ind. 2004) ("[A]ny defects in these documents should have been addressed before trial. Because they were not, the issue is waived.").

Without acknowledging his waiver, Kanable asserts that his charging information was fundamentally erroneous. To be considered fundamental, the error here must be so prejudicial to the rights of Kanable that he could not have received a fair trial. Dickenson, 835 N.E.2d at 550. Due process is satisfied where the information enables the accused, the court, and the jury to determine the crime for which the State seeks to convict the defendant. Dickenson, 835 N.E.2d at 550 (quoting Richardson v. State, 717 N.E.2d 32, 51 (Ind. 1999)). “Although the State may choose to do so, it is not required to include detailed factual allegations in the charging instrument.” Id. Any error in a charging instrument is fatal only if the defendant is misled, or the information does not place the defendant on notice of the charge he faces. Id.

Kanable claims that his charging information was deficient in two respects: the range of dates alleged; and the alternative methods of child molesting charged. The charging information reads, in relevant part:

Count 1: CHILD MOLESTING[,] I.C. 35-42-4-3(a)(1)[,] A CLASS A FELONY . . . [D]uring November, 2005 through January, 2006 at or near 3142 N. 80 W. in Howard County, State of Indiana, James Kanable, a person of at least twenty-one (21) years of age, did perform or submit to sexual intercourse or deviate sexual conduct with [K.K], a child under the age of fourteen years, to-wit: 13[.]

* * *

Count 2: CHILD MOLESTING[,] I.C. 35-42-4-3(a)(1)[,] A CLASS A FELONY. . . [D]uring January, 2006 through April, 2006 at or near 3142 N. 80 W. in Howard County, State of Indiana, James Kanable, a person of at least twenty-one (21) years of age, did perform or submit to sexual intercourse or deviate sexual conduct with [K.K], a child under the age of fourteen years, to-wit: 13[.]

* * *

Count 3: CHILD MOLESTING[,] I.C. 35-42-4-3(b)[,] A CLASS C FELONY. . . [D]uring April, 2006 at or near 3142 N. 80 W. in Howard County, State of Indiana, James Kanable, did perform or submit to fondling or touching with [K.K], a child under the age of fourteen years, to-wit: 13, with the intent to arouse or satisfy the sexual desires of the defendant[.]

Appellant's App. at 7-9.

With regard to Kanable's first argument, that the range of dates prejudiced him, the charging information satisfies the statutory requirement of "stating the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense." Ind. Code § 35-34-1-2(a)(5) (2005). The State need not charge a specific date because the exact date of an act of child molesting "becomes important only in circumstances where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies." Hillenburg v. State, 777 N.E.2d 99, 103 (Ind. Ct. App. 2002) (no deficiency in charging information alleging two counts of child molesting over seventeen months), trans. denied; Buzzard v. State, 712 N.E.2d 547, 551-52 (Ind. Ct. App. 1999) (no deficiency in charging information alleging four counts of child molesting over period of eighteen months), trans. denied.

Kanable was clearly placed on notice that the State sought to convict him for three separate acts of child molesting that occurred between November 2005 and April 2006. Count 1 limits the timeframe to a specific three months and limits the conduct for which Kanable is charged to either sexual intercourse or deviate sexual conduct. Count 2, while charging Kanable with the same conduct as Count 1, changes the timeframe to a different three month period, which overlaps with Count 1 by a month. Count 3 limits the

timeframe to one month, April 2006, and charges a different type of conduct, fondling or touching with the intent to arouse or satisfy Kanable's sexual desires.

Also, the parties stipulated that K.K.'s birth date was July 29, 1994. Thus, there is no question that she was thirteen years old or younger when all three charged offenses occurred, and the exact date of any of Kanable's offenses is not required. See Garner v. State, 754 N.E.2d 984, 991 (Ind. Ct. App. 2001) (no error in charging information alleging molestation took place over five month period), summarily affirmed on transfer on this issue, 777 N.E.2d 721, 732 n.4 (Ind. 2001).

Regarding Kanable's second argument, we find no deficiency in the charging information because the State charged that Kanable either performed or submitted to sexual intercourse or deviate sexual conduct. "[W]here an information tracks the language of the statute, it will usually be specific enough unless the statute defines the crime only in general terms." Garner, 754 N.E.2d at 991. Indiana Code Section 35-42-3-4 reads:

A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting [as a] Class A felony if [] it is committed by a person at least twenty-one (21) years of age.

* * *

A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.

I.C. 35-42-4-3(a)(1), (b). The charging information follows the statutory language, and that language defines the crimes in specific terms. Thus, the State properly informed

Kanable that it needed only to prove that he either performed or submitted to the conduct charged to prove a conviction of child molesting.

Kanable also claims that the charging information exposed him to possible double jeopardy. In Buzzard, that defendant also argued that he would be unable to protect himself against future prosecutions for the same conduct due to the lack of specificity in the charging instrument. Buzzard, 712 N.E.2d at 550. We rejected that argument because “it is the record, not just the indictment or the information, which provides protection from subsequent prosecutions for the same offense.” Id. Here, a review of the record discloses the offenses for which Kanable is currently being punished and, consequently, protects him against the possibility of double jeopardy from future prosecutions.

Further, the charging information did not hinder Kanable’s presentation of a defense. Despite the fact that he claims the court erred by excluding evidence to support his alibi, which is addressed in more detail below, Kanable presented evidence that he could not have fondled K.K. on April 17 because he was at work. Most importantly, though, Kanable testified that he never touched K.K. in a sexual manner. In other words, his defense was that the child molesting never happened.

Finally, Kanable claims that the lack of specificity allowed the State “to bolster weak evidence by offering evidence of a group of acts.” Appellant’s Brief at 19. As the State correctly notes, Kanable never objected to any evidence regarding his conduct outside the charged dates. Thus, to the extent that he claims that evidence was

improperly admitted, he has waived our review of that issue.³ Redden v. State, 850 N.E.2d 451, 458 (Ind. Ct. App. 2006), trans. denied. Under the circumstances presented here, there was no deficiency in the charging information.

Issue Two: Exclusion of Evidence

Kanable next claims that the trial court improperly excluded evidence that would have impeached both K.K. and Detective Galloway, namely, a portion of K.K.'s videotaped statement to Detective Galloway.⁴ The State originally sought to have K.K.'s entire videotaped statement admitted under the Protected Person's Statute, Indiana Code Section 35-37-4-6. The court held a hearing where Kanable articulated two specific objections: K.K. was not a protected person; and the admission would violate Kanable's right to confront K.K.

Although the court denied the State's motion in a written order, that order is not part of the appellate record. Nevertheless, based on the court's comments during the pre-

³ Waiver notwithstanding, evidence that Kanable fondled K.K. under her bra, tickled her crotch with his hands, and placed his mouth on her vagina outside of the charged timeframes was properly admissible under Indiana Evidence Rule 404 because such uncharged misconduct is probative of his motive and inextricably bound up with the charged crimes. In Garner, we rejected the defendant's complaint that the trial court had improperly admitted evidence about uncharged sexual conduct between himself and the victim:

Each of the acts to which T.C. testified is direct evidence that Garner committed the charged offenses. Thus, it was not evidence of an unrelated bad act occurring at another time offered only to create the inference that Garner is a man of bad character. Instead, this evidence was direct evidence that Garner molested T.C. during the charged time period.

Garner, 754 N.E.2d at 992-93. "In terms of the language of Rule 404(b), it is not evidence of 'other' wrongs, but of the charged offense." Id.

⁴ Appellant has attached to the back cover of his brief a DVD version of K.K.'s statement that was converted from VHS format in support of his argument. Neither the DVD nor the transcribed portion of K.K.'s statement, which is in Appellant's Brief, was authenticated by a witness, considered by the trial court, or certified by the court reporter as required by Appellate Rule 30. Thus, we will not review the DVD.

trial hearing and during the trial, the court denied the State's motion to admit the statement, in part, because the quality of the videotaped statement was poor.

During the trial, Kanable's counsel attempted to elicit testimony from both K.K. and Detective Galloway that K.K. told Detective Galloway that the last molestation took place on April 17. Kanable's counsel asked her when was the last time that Kanable touched her, and K.K. said she did not remember the exact date, but it happened on a school day after Easter in the evening. Kanable called Detective Galloway as a witness, and the following exchange took place:

Q: And [during the interview] did you specifically ask [K.K.] when the last time was that Jimmy Kanable touched her?

A: Yes.

Q: And what specific date did she give you as the last offense occurring?

A: We struggled a lot coming down with a specific date. She[], we used approximate[.]

* * *

Q: In your interview with [K.K.] on April 25th, did she specifically tell you that the last contact, touching and fondling over the clothing, had occurred on April 17th in the Kanable home 5:30 to 6:30 of an evening?

A: Approximately.

Q: And how is that you were able to get Kristen to determine that that was the last date?

A: It was never determined a hundred percent for sure it was the last date. It was approximately the 17th, possibly even the 14th, sometime during that week after Easter.

Q: Did you not, in your interview with Kristen, establish that this touching occurred on the Monday after Easter?

A. In my report I said approximately the 17th so I cannot say she one hundred percent [sic] said it was the 17th, no.

Transcript at 168-69. Kanable's counsel then asked for a hearing outside the jury's presence, which was granted, and asked the court for permission to play the final two minutes of K.K.'s videotaped interview. He argued that K.K. had specifically stated that the last touching occurred on April 17 in her statement, which was inconsistent with her testimony at trial, and that portion of her statement should be admitted for impeachment purposes under Indiana Evidence Rule 613 as a prior inconsistent statement.

The State argued that April 17 was never specifically established as the date, and, consequently, the videotaped statement would not impeach the testimony of either K.K. or Detective Galloway. The court noted that it had already made a finding that "the videotaped statement does not provide sufficient indications of reliability to allow its use in the trial" in rejecting the State's motion made under the Protected Person's Statute. Id. at 174. The trial court then stated:

The videotape was, I didn't time it, but I would guess 35 to 40 minutes long. That in itself is not a problem. I don't know how clear your two minute portion is but my memory of that videotape involves two different things, as I indicated in my ruling, it is of terrible quality and I don't even know if the two minutes that you are citing are good quality or bad quality. I don't quite see how you can introduce this without having the entire context[,] which would be the entire tape, being played because my memory of the tape is this issue was discussed more than once, as much as I could tell. And it's almost like any other item of evidence, you can take two lines out of a ten page document and, of course, the technique then is to read additional lines that may exist in the document. I don't quite see how you're going to get around the problem of the poor quality of the tape.

Transcript at 175. In response, Kanable's counsel argued that he was denied the opportunity to present an alibi defense if he could not prove that K.K. said the fondling occurred on April 17. He agreed with the court that he had not filed a notice of alibi even though he had had the opportunity to do so. The court denied Kanable's request to play the final two minutes of K.K.'s statement, and Kanable's counsel made an offer to prove that "the last two or three minutes of the tape which deals specifically with the child establishing April 17 as the last incident of touching or fondling." Id. at 180.

After the jury returned to the courtroom, Kanable's counsel again questioned Detective Galloway:

Q: And in that report, do you not indicate that [K.K.] indicated to you that the most recent time that Jimmy touched her was approximately April 17th, 2006?

A: Yes.

Q: Did she relay to you that this had occurred at the Kanable home on a school day after her track practice?

A: Yes.

Q: And how is it that you were able to determine April 17th?

A: We debated on several days that week. She really couldn't come up with a date so we started the process of elimination and we said the 14th or the 17th initially and then approximately the 17th.

Q: Did the child indicate to you, though, in your interview that this had occurred on the Monday after Easter?

A: I don't recall that. It very well could be. I know it was approximately[], I can't remember exactly what was specifically in that interview except for what you told me today.

* * *

Q: Just to kind of close things out then, Detective, your best recollection then as to the last contact that Kristen said occurred, when was it?

A. The 17th.

Id. at 181-83. Kanable then presented the testimony of Matthew Drouhard, the Human Resources Supervisor at Daimler Chrysler, where Kanable worked. Drouhard testified that based on Kanable's employment records, Kanable was at work on April 17 from 3:32 p.m. until 8:04 p.m., when he checked out for dinner, and that he returned from dinner at 8:18 p.m. and then left work at 11:30 p.m.

The admission or exclusion of evidence is a matter left to the sound discretion of the trial court, and a reviewing court will reverse only upon an abuse of that discretion. J.D.P. v. State, 857 N.E.2d 1000, 1006 (Ind. Ct. App. 2006), trans. denied. When reviewing a trial court's decision under an abuse of discretion standard, we will affirm if there is any evidence supporting the trial court's decision. Id. Although the court did not specifically state its reasons for denying Kanable permission to play this portion of K.K.'s statement, we glean from its discussion two grounds: 1) the poor quality of the videotaped statement; and 2) playing the requested portion of the videotaped statement would require playing the entire videotaped statement.

The parties discussed the poor quality of the videotape during the pre-trial hearing, and the court also addressed the videotape's poor quality during trial. The foundation required for the admission of a recording made in a non-custodial setting are that the recording is authentic and correct, that it does not contain inadmissible evidence, and "that it be of such clarity as to be intelligible and enlightening to the jury." Kidd v. State, 738 N.E.2d 1039, 1042 (Ind. 2000). The trial court is afforded wide discretion in

determining whether these criteria have been met. Id. Again, we have neither the original videotaped recording nor the trial court's written order that denied the State's motion to present K.K.'s videotaped statement. As such, Kanable has not shown that the court abused its discretion in determining that the quality of the videotaped statement precluded its admission.

The second ground supporting the court's exclusion of the evidence appears to be that admitting a portion of the statement would require admission of the total statement. Indiana Evidence Rule 106 embodies the "completeness doctrine." Sanders v. State, 840 N.E.2d 319, 323 (Ind. 2006). That rule provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

Ind. Evidence Rule 301. The doctrine of completeness prevents the factfinder from being misled by statements that were taken out of context, and its "purpose is to provide context for otherwise isolated comments when fairness requires it." Sanders, 840 N.E.2d at 323.

The court stated that the discussion of the dates occurred in more than one place in K.K.'s statement, and Kanable's counsel did not contradict the court's assessment. Thus, it appears that the State would have been entitled to have the entire videotaped statement played for the jury. Given the court's earlier findings that the statement was not sufficiently reliable and the quality of the videotape was poor, we cannot say that the court abused its discretion in denying Kanable's request to play only a portion of the videotaped statement.

Finally, any error in excluding evidence is harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the defendant's substantial rights. Washington v. State, 840 N.E.2d 873, 885 (Ind. Ct. App. 2006), trans. denied. Here, Kanable's substantial rights were not affected by the court's exclusion of this portion of K.K.'s statement. Detective Galloway testified that K.K. named April 17 as the last date that Kanable molested her and that the molestation took place in the evening. Drouhard testified that Kanable's work records showed that Kanable was not at his home but at work at that time, despite the fact that Kanable never filed a notice of alibi. Thus, even if the court erred by excluding the last two minutes of K.K.'s statement, such error was harmless.

Issue Three: Unanimity in Verdicts

Kanable also argues that the jury may not have reached unanimity in its verdicts because "[t]here is no definition of the specific act required for conviction." Appellant's Brief at 26. Kanable did not object at trial to either the verdict forms or the verdict, and, consequently, he has waived this argument. Scuro v. State, 849 N.E.2d 682, 687-88 (Ind. Ct. App. 2006) (citing Bruno v. State, 774 N.E.2d 880, 883 (Ind. 2002)), trans. denied. Kanable again claims that this error is fundamental to avoid his waiver, but he provides no explanation why.

Indeed, Kanable acknowledges that this issue is "interrelated" with his claim that the charging information was deficient. Appellant's Brief at 13. We have reviewed the charging information in depth above and determined that it sufficiently informed Kanable

of the charged offenses but did not permit the State to present inadmissible evidence. Kanable's waiver aside, he is entitled to no relief on this claim.

Issue Four: Double Jeopardy

Finally, Kanable claims that his convictions for Count II and Count III violate his right to be free from double jeopardy because "Count III is a lesser included offense of Count II or at best, is based on the same facts." Appellant's Brief at 31. Count II charged that he molested K.K. by knowingly having sexual intercourse or committing deviate sexual conduct between January 2006 and April 2006, and Count III charged child molesting by fondling or touching in April 2006.

When a double jeopardy challenge is premised upon convictions of multiple counts of the same offense, the statutory elements test of Richardson, does not apply. Thomas v. State, 840 N.E.2d 893, 900 (Ind. Ct. App. 2006) (citing Richardson, 717 N.E.2d at 53), trans. denied. Thus, in order to determine whether Kanable's two convictions for molesting K.K. as charged in Counts II and III violate his right to be free from double jeopardy as provided in Article I, Section 14 of the Indiana Constitution, we turn to the "actual evidence" test from Richardson. Id.

Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

Richardson, 717 N.E.2d at 53. The defendant bears the burden of showing a double jeopardy violation under the actual evidence test. Newman v. State, 751 N.E.2d 265, 271 (Ind. Ct. App. 2001), trans. denied.

Kanable does not, however, discuss the evidentiary facts underlying his two convictions. Indeed, Kanable presents yet another variation of his claim that his charging information is deficient, which we rejected above. “The charging information[] in any of the Counts do[es] not allege separate essential facts or times sufficient to protect [Kanable] from a Double Jeopardy Violation.” Appellant’s Brief at 33. Because Kanable does not satisfy his burden of proving that the jury relied on the same evidence when it found Kanable guilty of Counts II and III, he is not entitled to relief on this claim. See Robinson v. State, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005) (“Robinson has failed to make this required showing, and his argument therefore fails.”).

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.